THE YOVNGER BROTHER

HIS APOLOGIE,

OR

A FATHERS FREE POVVER

disputed, for the disposition of his Lands, or other his Fortunes to his Sonne, Sonnes, *or any one of them: as right Reason, the Lawes of God and Nature, the Civill, Canon, and Municipall Laws of this Kingdome doe command.*

B.N.C.
F.MADAN
OXFORD

PROV. 31. 8. & 29. 7.

Open thy mouth for the dumbe, in the *Cause of all the Children of Destruction.*

The *Righteous* considers the *Cause of the Poore:* but the *Wicked* regard not to know it.

OXFORD.

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TO
ALL FATHERS AND SONNES OF WORTHY *FAMILIES*

whom Vertue, Birth, and Learning have justly stiled GENTLEMEN, *Health, Happinesse, and Encrease of the best Knowledge.*

AS in the Front of this brief Discourse, there is (Right Worthy Gentlemen) already delivered unto you some light of that which concernes the Qualitie, Reason, and Scope thereof: so do I here sincerely professe, that I did not privatly write it at first but for private satisfaction; neither doe I now make it publike, but with due relation to the generall good of *Great Brittaine*, and for the exercise of Honourable Spirits, in this our much-speaking and paradoxicall Age.

Not upon the least presumption of a self sufficiency, to confront thereby any receaved custome (if any such be) nor to diminish the naturall reverence due by

Younger Brothers to their Elder; not to enkindle Emulations in Families; nor to innovate any thing to the prejudice of publike or private quiet (which none I hope will be ſo ill affected as to ſuppoſe,) neither mine inoffenſive zeale for younger Brothers (amongſt whom I am ranked one) nor the abſolute conſent of Imperiall and Eccleſiaſticall Lawes (which I having a liitle ſtudied, doe not a little reſpect) nor the particular honor I bear to the uſages in this point, of our ancient Brittaines (from whom I am deſcended) nor deſire to maintaine and juſtifie an Act in this kinde, done by a friend (whom I muſt ever reverence) nor yet the hope of bettering my private fortunes (which moves men much in theſe our times) hath drawne me to this Vndertaking: but principally (as before is ſomewhat touched) the ſingular reſpect which (as a *Patriot*) I beare to the glory, and good of Gentlemens houſes, whoſe beſt originall, ſureſt meanes of maintenance, and principall Ornament is *Virtue*, or Force of Minde: The want whereof, is a common cauſe of Ruine. The free power therefore of You who are Fathers, is here in ſome ſpeciall caſes argued and defended, to give you occaſion thereby to conſider with the clearer Eye-ſight, for the eſtabliſhment and continuance of Families. Here alſo the naturall Rights of us that are Children be ſo diſcourſed and diſcuſſed, as that We younger Brothers may have cauſe & courage, to endeavour by vertuous meanes, to make our ſelves (without the leaſt wrong to any) capable (if need ſhall be) of the chiefeſt uſes. And Both and All are ſo handled, as that no offence can reaſonably ariſe in any reſpect: much leſſe, for that the whole is conceaved and written in nature onely of an Eſſay or Probleme,

Probleme, to which I binde no man to afford more beleefe, then himſelfe hath liking of: being free to refute the whole, or any part at his pleaſure, as he feeles himſelfe able and diſpoſed.

If I may ſeeme to ſome, to have handled this Subject with more earneſtneſſe and Acrimonie then they thinke expedient: let them be pleaſed to weigh the *Decorum* of Diſputes, which is principally herein obſerved: their nature abſolutely requiring quickneſſe & vehemency, on whether ſide ſoever.

As for the remedies of Evils, by way of enacting Lawes, that is the proper office of Magiſtrates, and Courts of publike Counſell: nevertheleſſe to ſpeak and treat of them (under the favour and correction of Superiours, to whom doe alwaies very dutifully ſubmit) is a thing which may well belong to every man. But, for thoſe grave and learned Cenſors, to whom I may ſeem to have beſtowed my paines in very needleſſe Arguments, becauſe no leſſe then I my ſelfe, they hold the caſe (as here it is put) to bee moſt cleere and out of controverſie: to ſuch I anſwer, that I writ it not for them, unleſſe perhaps to confirme their judgements; but for others, who are not altogether ſo principled or perſwaded. Nor to any, as to preſcribe, or binde, further then their owne conſciences ſhall thinke good. For that were farre too peremptory.

Finally, nothing being here defended but by Authority, Reaſon, and Example; nor any perſon taxed, nor particular perſonall Vices: if nevertheleſſe I have not perform'd my part in the work ſo well as I deſire, or as the Cauſe deſerves (which

I feare I have not) yet my hope is (Right Worthy Fathers and Worthy Sonnes of Right Worthy Families) that for my honest meaning, and good Intentions sake, you will ever conceive well of, and take into your speciall Protection,

Your unfained Well-wisher,

F. A.

THE YOUNGER BROTHER HIS APOLOGIE.

CHAP I.

The occasion of writing this Apologie, is to prove that Fathers may in some cases dispose their worldly Estates to which of their Sons shall reasonably please, &c. for so much thereof as they will; and that to be lawfull by the Law of God, of Nature, and of Nations.

NOT many months since being invited by a dear Friend of mine to a solemne Feast, made by him to many of his well-deserving Friends, it was my fortune at that Meeting to acquaint my selfe with many Gentlemen of no mean discourse: Whereby I feasted as well my Understanding with their pleasant Society, as my Taste with the the variety of most excellent Meat.

With what our senses were delighted, I let passe to recompt, since neither profit, pleasure, nor praise can arise thereof, either to the Writer or Reader. Onely my intent is, to make my Reader acquainted, what accident caused mee to write this small Treatise, and emboldned mee to publish the same to the common view of this all-reprehending Age. In which never theless I rather hope for Allowance, then in any sort fear Displeasure.

For though my subject be New, yet I hope it shall want at the first rather Age, and Strength, which grows by yeares; then probable Arguments, yea forcible Reasons to defend it selfe. As for Friends, I trust, it will find some, and peradventure more then Enemies, if it deserve well. For, as younger Brothers

be

be more in number then Elder, so are they generally more free in bestowing their deserved Love. For *Want* breeding *Understanding*, makes them know and prize their Friends * according to their Worth. Whereas the Elder, either seated in his Fathers Wealth or Possessions, with *more then hopes* to enjoy their Fortunes, do sometimes neither love truly themselves, nor any man else; but abusing that which indeed might gain the love of God and Man, and easily maintain their hereditary Honour, loose themselves in Vanity and most idle courses; yea in their Fathers lives, so strangely carry themselves (*presuming rather on precedence of Birth, then Worth*) as though the Law of God, of Nature, and all other Canons, Civill, and National Lawes, Constitutions, and Customes sprung from them, could not either in Reason or Religion barre them of that which they expect; or give to a well-deserving younger brother any little * hope lawfully to share with them the least part of their Fathers Inheritance: much lesse to expect an Elder Brothers Fortunes: or *on any termes*, or *for any cause*, by a Fathers favour, to steppe before them.

* Some *freinds* stcke closer then a *Brother*, Prov. 18. v. 24.

* The harsh & malevolent disposition of *some Elder Brothers* is graphically delineated by our Saviour in the Parable Luc. 15 28. [See vers. 32. *the Fathers Apology for the younger.*]

Which Argument among many others, was then handled by the Company *pro* and *contra* so doubtfully, that it gave mee occasion to write this present Discourse concerning the free power of *some Fathers*: Wherein I intend not to displease or inconciliate Elder Brothers; no not them, who not inheriting their Fathers Vertues, strive not to maintaine their Ancestors Honour, in preserving their Noble Names * and Families, by which as a reward to their Virtues and Travels, Men have alwaies laboured to live to all succeeding Ages, in their Posterity.

* Amongst all Gods temporall blessings promised as Rewards to his faithfull servants, I finde none greater in holy Writ, them the spreading of their Family. So God to Abraham; I will make of thee a mighty people. What God prizes as so great a guerdon to his best Favorites, shall *Unworthy Man* esteeme a Trifle? Carpenter, Achitophel. part. 3.

But my intent is to shew, how *Opinion* and *Inconsideration* make oft-times the Wise to bee scrupulous, and through *superstitious Zeale*, not onely to feare to doe that which Reason may or might have commanded; but in their *erroneous Judgements* rashly to condemne other mens Acts as unlawfull and irreligious, which according to Reason and Religion have

beene done and ratified, using themselves THAT CUSTOME for the overthrow of their Families, which was indeed only devised for their preservation; and being hoodwinkt with false conceipts, doe wittingly leave that, which they and their Ancestors had gotten, as the reward in this life of their vertues, to be the future Fuell of all inordinate Desires and Bestiall sensuality, which in their providence they could willingly otherwise have disposed of.

All which I doubt not but to make cleare to the impartiall Reader: proving by the Law of God & Man, that a Fathers freedome is such, that hee may *Lawfully* and *Religiously* give his Lands and Goods, nor other his Fortunes, to any of his Children, for the preservation of his Name, and comfort of his Posterity, without all scruple, as right Reason, or the better Deserts of a Sonne shall perswade him, void of all tenderneſse or blindneſse of Affection, which oftentimes leads a Fathers Will, & corrupts his Understanding; so as he be true Lord thereof, not tied by consideration of Mony receaved, or Contract made by Marriage of his Sonne, which may alter the case, and make the Sonne Lord, and the Father to have but the use only during his life, as all our common Lawiers well know. In which case, we also have experience, that our Law permits many times to alter the Title, and to undoe what by former times was held not to bee controlled. But of this point I will not treat. Only I meane to argue, whether a Father possessed in Fee-Taile, may in law and equitie, upon the former considerations, make any child which hee hath, his Heire, leaveing to the rest a competency; and doe an Act which according to Equity & Religion may stand good and valuable.

In this my present Discourse let not any expect many Quotations of Authors; for I never read any of this subject. What I bare away of my friends Conference, I will set down; and what other Reasons my understanding shall afford; wch I hope shall prove so Demonstrative, that they shall bee of Authority sufficient * to satisfy any Reader; or incite some better Penne to treat of the same more largely and substantially; and lastly and chiefly, to cleare some of my Worthy Friends from those imputations, which I finde the Ignorant

* 'Tis one thing to convince an error: another, to make men forsake it: A third, to win them to the truth. vid. pag. 117. 2. part of divine Essence & Attributes; by Reverend D. *Iackson*, worthily honord with the Elogie of an *Incomparable writer*; by. M. *Pink* of pious memory. See his Triall of syncritic, serm 4. p. 57.

to lay upon them. Which done, I shall thinke my Time and Paines well imploied,

CHAP. 2.

That the grounds of all good Constitutions being in Nature, yet she, neither before, nor after the Law of Propriety established, did command, that All should be left to any one, more then to another.

* Natura Divinitatis fulgor, Vallef. de fac. phil. c. 1. p. 22.

SUch are the wise and temperate Workes of Nature, * that nothing is done by her rashly or unadvisedly. For though in the Infancie of the World, shee had an invincible power to produce all effects which then had their Originall in her: yet, being studious to please Man-kinde not only with variety, but also with raritie, shee successively discovers and daily discloses to the searching Wits of the World her Secrets, as Time and Place either hath or doth daily beget Occasion; still as it were keeping in store her heavenly Treasure, till Mans necessitie best moves her Liberalitie.

For what can the Wit of man devise, or what doth Time or Art make known which good is, that Nature, from the first time shee beganne to worke, hath not in her (though to her selfe only knowne) the ground thereof, either to produce the particular or generall effect, which wisely shee left to be tempered, according as the Reason of Man (whose glory shee pretends) should thinke fittest to give the Forme, as Time, Place, and the nature of the Thing should require?

For though Marriage, as it is a conjunction of Man and Woman, containing an inseparable societie of life, be of Nature it selfe, and had its Originall in the state of Innocence, which (as Divines, and Canonists hold) was undoubtedly ordained for Issues sake, whereby a Lineall succession was also intended: yet, untill necessity enforced Man to make Division of the Blessings of God & Nature, the Claimes and Rights which follow Lineall succession to Inheritance, were not discovered. For all *communicable* things being common amongst Men, many Ages were numbred from the Worlds beginning,

beginning, before any man laid proper claime to any thing, as due to himselfe alone. Whereby it well appeares, that hereditary succession, or Title to a Parents Lands or Goods, could not then be in use, or so much as thought of.

This, I perswade my selfe, was the Law of *Nature undepraved*. Which I incline my Will the sooner to credit, because I find that all sorts of people, as well Christians as others, who have perfection in Naturall society, or a perfect and Religious life in a Naturall and worldly conversation of Men, have and doe daily imbrace this naturall and * blessed Community. * See Act. 2. 44.

Which happy Law of Nature (as I have said) for many ages endured, and without doubt had longer continued, had not sinne (which breakes all union, and depraves all Naturall perfection) gotten such dominion in the minds of Men, that in Naturall Equity all things could not longer bee used in common.

For as some being possest with an insatiate desire to get, rule, and raigne; sought the oppression of others, by taking from them that freedome which Nature had given them: So others given to sensuality and idlenesse, sought to live of other mens labours; whereas by Natures lawes every one ought to live by his proper industry, within the rules of Justice and Honesty. Whereupon naturall Reason perswaded, that all things being divided, every Man should know his owne: otherwise, no peace or concord could be maintained in Humane society. For all things being common, the way lay open to every man at his pleasure to abuse others, and as it were to rob them of God his Blessing.

Hereupon, Aristotle judged the Division of all worldly Goods, to have been agreeable to the law of Nature, which the precept of our Decalogue seemes to approve, *Thou shalt not steale*

For the Law of God is never contrary to the Law of Nature: neither doth Nature ever contrary it selfe, though some may perhaps thinke that herein she hath. For albeit at the Creation of all things together with Man in the state of Grace, a fraternall and amicable Community was intended: yet was it not so absolutely resolved of by Nature, but

that by Necessity (I meane by the fall of Man from Gods Grace) she did dispense with this Law, and left free to Mans choice to embrace, upon her warrant, either the One or the Other, as best might fit the Time, Place, and Natures of Men, which ever since the World began, have given occasion of making of all Lawes.

Whereby we see, that though Nature give the grounds to Lawes. yet Mans understanding still gives the particular Forme. For Nature creating Man, gave to him those worldly blessings to use well, with Warrant either to hold them in *Common*, or in *Proper*, as reason from time to time could best persuade his Will.

But, when Reason and Will had agreed, that it was fit that every Man should enjoy his Part in Proper; Nature moved Man further, and told him, that now he might lawfully thinke on his succession; and not only live in his species, but breath, as it were, to the Worlds end, in a line-all Posterity by honourable Deeds and Virtuous Acts; with which Desire, Nature, as a wise mother, so inflamed Man (her Noblest Child) after his Fall from Grace, that some Men by Natures light only, have done Acts almost above Nature; and none have hardly beene so base, but desirous to live, and leave an honourable memory behind them.

Which that they may the better doe, Nature hath not only given them power to leave their wel-gotten Wealth, but in a manner their habituall * Vertues to their Issue; in which this worldly Honor (the Soules worldly life, and Vertue's temporall Reward) may live free from all-killing Time. Yet did shee not then by any Command, leave it to any one in particular, but giving a generall suggestion of the Fitnesse of the Thing, left the Forme to their best Discretion. For had shee not done so, all Nations had beene tied to observe one Forme, in leaving their goods and Fortunes to their Posterities; for Nature being One, without change to all, of necessity prescribes no binding Rule to any in particular, but to all in generall; no man being able to say; This, Natures Law commands me to doe, and yet binds not any other to doe the like. Which is evident in the Matter of Succession,

* They which are defended of ancient Nobility, have in the an implanted compleat Generosity (or vertuous Disposition) αὐτόφυτον, καὶ διαρκῆ τὴν ἀρετήν. Dio Cas. Hist. Ro. l. 44. ex Orat. M. Antonii.

or

or Claimes of Inheritance; no one Country obſerving the Forme held by another; or tying it ſelfe without controll to obſerve its owne, as I ſhall hereafter declare.

For albeit (as I have ſaid) the Conjunction of Man & Woman (which we call Matrimony) together with the Deſire of Iſſue, be of Nature; from whence alſo are ſprung not onely a Diviſion of the Goods and Fortunes of this World, but alſo a laudable Deſire to preſerve a Family and Name, by the ordination of Heires to well-gotten Poſſeſſions; yet did Nature never ſet down as a Law, that thoſe Fortunes ſhould be left to the Elder Brother or Younger, or to any One in particular, or to All; but to whom the Father, being true and free Lord thereof ſhould beſt deviſe by Will guided by Reaſon. For it was never yet averred by any ſound Divine, Philoſopher, or Lawyer, that Nature makes immediatly Heires, but Men, whom the Poſitive Lawes of every Country ordaine by that Forme and Power of Law, where ſuch an Act ſhould bee done. And this is (I preſume) without controll, what the Law of Nature commanded touching the Matter in Queſtion. Next let us ſee, what the Lawes of God doe command.

CHAP. 3.

That the breach of ſome written Lawes of God, upon warrant of the primary Law of Nature, is without ſinne: & that therefore, there can be no ſuch Right in Primogeniture, which is not in the Fathers power to avoid, though there were a precept to the contrary, as there is not.

IF Nature, being taken for the principal and all-producing cauſe of the whole Frame of the Univerſe, with all Creatures therein, being nothing elſe but the working will of the Higheſt and firſt Mover (as Divines & Philoſophers hold) then ſurely muſt Natures Law be his Will, which he cannot contradict or counter-mand, except he ſhould be contrary to Himſelf, wch he cannot. For, what is in God, is God, therefore Conſtant and Immutable. Out of which Principle, it is eaſily proved, that if the Law of God teach that which the Law of Nature hath ordained, the Right of Inheritance cannot be tied to any other perſon or perſons, then to thoſe which the Fathers

Will approves, according to the Power given him, by the Lawes of Nations where he lives. Which Power derived from Natures Law, cannot erre from the Law of God. For whosoever shall consider but of Gods Commandements given to Man, shall well find, that God thereby hath still seconded his former Ordinances given by Nature. For so long as Mankinde lived in a sort, after the Innocence which Gods Grace in his first Creation had wrought in him, God gave him no other Law: But when as by sinne those sparks which remained after his Fall, were quite extinguished; he gave him New Lawes, yet agreeable to Nature.

As for example in our present Affaires: When Man had made by Natures privilege partition of Gods and Natures Blessings, then God said to his People by the mouth of *Moses*, *Thou shalt not steal: Thou shalt not covet thy Neighbours house, his Wife, his Ox, his Asse, or any thing that is his.* As also, *Thou shalt not kill.* Which with all other his Commandements teaching what sinne is, are agreeable to the Law of Nature, yet are dispensed withall, as farre as the Lawes of Nature ever permitted. For, though that the expresse Command of God bee, thou shalt not covet any thing that is thy Neighbours, nor kill; yet, in some Cases, Both may lawfully be done. The one, in extreame Want of present Food: the other, in defence of Life & Goods; In which, The Law of God, is good by the Originall Law of Nature, which made All for the sustenance of Man; and gave leave to defend Life with the losse of anothers Blood; yea, Life, if otherwise it cannot be. Upon which Ground, I argue thus.

Suppose the Law of God did at this present command (which indeed it doth not) that the Inheritance should be left to any one particular Person, and namely to the Elder-Brother: yet in some Cases it would not binde the Father to observe it. For as in the former Commandements, upon some considerations the Commandement may bee dispens'd withall, so in this. For it is not sufficient to be the Elder-Brother, or the neerest in Blood to gaine an Inheritance in the Case which I have now proposed; for other Circumstances must concurre, which if they be wanting, bare propinquity or ancienty

cienty of Blood may justly be rejected, and he that is second, third, fourth, first, or last, may lawfully be preferred before the First, and this, by all Law, Divine and Humane, and by all Reason, Conscience, and Custome of Nations Christian.

For if it should happen that the next in Blood should be a Naturall Foole, or a Mad-man, or being taken by the Turkes or Moores in his Infancy, and educated in their Religion, would maintaine the same: or if any other such Accident, ministring cause of just Exception should fall out; is it likely that any Law would allow, that such a man should be admitted to the Inheritance? Wherefore how idly should they talke, that would have it to bee his Birth-right, or that God and Nature had made him Heire: since neither God nor Nature doth immediately make Heires, as before is declared. Upon which Ground, our Common Lawyers say, that No Heires are borne, but Men and Law make them.

I confesse, that in Holy Writ, great * Respect is had of the first-begotten, and a Blessing is held to come to Parents thereby. But this Blessing I presuppose to bee, that thereby the Feare of sterility was taken away, which in the Old Law was held to be a great Punishment of God; and in respect thereof, Parents had of themselves, and by the Nationall Lawes and Customes, a great Regard of their First-begotten, and preferd them to the better part of their Possessions: yet not by any Command from God, as a Precept to binde his Elect people under paine of sinne. For had any such Law bound them under such a Penalty; then should it binde all Christians now, on the same Conditions. But we see it by Generall Practise of all Countries to be otherwise. Therefore it followes directly, that it was not Gods Command, but a Nationall Law. For God both is, and ever was One, without change to all his People, and so ever were and will be his Laws Positive, made for them that truly worship him.

* In allusion hereto, the Church Triumphant is stiled, The Church of the First-borne. Heb. 12.23.

The Claime which *Esau* made to his Birth-right was not by the Law of God, as some ignorantly affirme, but by the Lawes of his Country. For, should the Divine Law have commanded it, it had been sinne in his Mother and Brother, by Cunning-

Cunning to have got it from him. Neither could the Father or the State wherein they lived, upon no juſt cauſe knowne but to God alone, without ſinne have ſettled the ſame upon his Brother *Jacob*, as it was, and as it may ſeeme, by allowance from God, and as it may bee judged by ſucceſſe. Whereby it is thought, that God ordained it, as a Puniſhment of the One, & Bleſſing of the Other: which by the permiſſion of ſinne to bee committed, God never doth.

* *Iacob* prælatione divinâ & primogenituræ & benedictio. nem promeruit (Ita Eximius Præſul D. Epiſc. *Ciceſtr.* Apparat. I.)

Neither did the Nationall Law or Cuſtome of the Jewes (as it is ſaid) abſolutely command the Father to leave to his firſt begotten, all, or the greateſt part of his Goods and Fortunes. But in caſe he died, not diſpoſing thereof by Act in his Life, or Will at his death, then the Cuſtome * of the Nation, laid a double Portion on the Eldeſt or firſt-begot, providing for the reſt proportionally.

*Viz. Grounded on the Right of Primogeniture. See Deut. 21.17. and the *Geneva* note there.

By all which you may collect, that neither the Law of God or Man, in this caſe, commanded that *Eſau* ſhould have the Inheritance, but Power to do the contrary, was given to the Father in his Lifetime, even by the Law it ſelfe. For many Divines hold that *Eſau* ſelling his Birth-right (as it is termed) ſold not Goods, or Lands, but his Claime of being * High Prieſt after his Father, which by Cuſtome was to come to him being his Fathers Eldeſt Sonne. For which Dignity God ſeeing him unfit, permitted him to paſſe away his Right in his Fathers life, as we read in Holy Writ, and which God ſeemed to approve. And thus I hope this Objection is anſwered.

* At firſt, Fathers and their firſt borne after them, were both Kings & Prieſts in their owne houſes: but in Moſes daies, this Prerogative of Primogeniture ceaſed: *Aaron* & his Progeny being inveſted in the Prieſthood, & *Moſes* being as *King*. Deut. 33.5. (As judicious Mr Godwyn in his Moſes and Aaron. Lib. 1. c. 1.)

Further, if it were true, that the effect of Elderſhip were ſuch by the Law of God, as ſome paſſionately defend, that is, that the whole Inheritance ſhould of Right pertaine to the Eldeſt; then ſure it followeth by good Conſequence, that there ſhould nor ever could have been but one Temporall Lord of all the World. For of Neceſſity *Adams* Inheritance ſhould have gone ſtill to the next in Blood: which how abſurd it is, let all men judge.

Moreover, we read, that *Noë* having three Sons, and the whole world to leave unto them, gave it not All to the Eldeſt, but equally divided it among them & their Poſterity, as all Authentike Hiſtories doe witneſſe.

Againe, God requiring Obedience of Children to Parents, promiſed

promiſed a Reward, ſaying, Honor thy Father and thy Mother, that thy Daies may bee long in the Land which the Lord ſhall give thee; Which ſurely was not ſpoken to one, but to all the Children of men. For with God there is no Exception of Perſons, but as a juſt and pious Father, hee gives every one according to his Deſerts. *Terram autem dedit filiis hominũ.*

We read alſo in Holy Writ, how the Prodigall Sonne being weary of his Fathers houſe, came to him and boldly ſaid, *Pater, da mihi portionem ſubſtantiæ meæ quæ me contingit:* This child of which the Goſpell ſpeakes, was the younger Brother: yet you ſee how boldly he ſaid: Give me that Portion of Goods which belongs to me. By which words it is evident, that a Diviſion or Partition of a Fathers Fortunes was then * in vſe: and that any child as well younger as elder had power by law to demand his Legitimate, or Childs part, according to the nature of the Civill and Canon Law, as you have heard. For the words following in the ſacred Text are theſe, *Et diviſit ſubſtantiam illis.* And hee divided unto them his Living. Thus we ſee, that the privilege of Elderſhip was then excluded; which now in our Country by Cuſtome only, is gotten to be of ſuch Force.

Luk. 15. 12.

* As is further evidenced Luk. 12. 13 where our Saviour was willed by One, to require his Brother to divide the Inheritance with him. Which was the ſuit of a younger Brother, (aggreeved at the churliſh Iniquity of his Elder.) *The Judgement of that Illuſtrious & Religious divine, M. Iohn Hales: the moſt exquiſite Illuſtrator of Chryſoſtome. publiſht by the Right Noble Knight Sir Henry Savile, now in Glory.*

But it may be objected, that this was a Parable only (as indeed it was) and cannot bee alleaged as Law. True it is; yet it cannot be denied, but that all Similies, Parables, or Examples, which ever were alleaged by the wiſe and learned to repreſent the Truth, have ever beene derived from the cuſtome & nature of Things, according to the knowne Truth in that time, and place, and to thoſe perſons to whom the Speech or Diſcourſe is directed. And ſhall we thinke that our Saviour Chriſt being Wiſdome and Truth it ſelfe, treating of ſo important an Affaire, as he did then in the Goſpell, would uſe an unknowne Diſcourſe, or ſtrive to make the Truth appeare to our weake Underſtanding by a Parable which in Equity could not bee true? No ſurely. For it appeares by *Solomon* his ſucceeding his Father *David*, that *David* had power by the Lawes of God and Man, to give his Kingdome to the worthieſt; which hee deeming to be *Solomon*, gave to him his Kingdome, though hee was the youngeſt Sonne.

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Cunning to have got it from him. Neither could the Father or the State wherein they lived, upon no juſt cauſe knowne but to God alone, without ſinne have ſettled the ſame upon his Brother *Jacob*, as it was, and as it may ſeeme, by allowance from God, and as it may bee judged by ſucceſſe. Whereby it is thought, that God ordained it, as a Puniſhment of the One, & Bleſſing of the Other: which by the permiſſion of ſinne to bee committed, God never doth.

* *Iacob* prælationem divinâ & primogenituræ & benedictionem promeruit (Ita Eximius Præſul. D. Epiſ. *Ciceſtr.* Apparat. I.)

Neither did the Nationall Law or Cuſtome of the Jewes (as it is ſaid) abſolutely command the Father to leave to his firſt begotten, all, or the greateſt part of his Goods and Fortunes. But in caſe he died, not diſpoſing thereof by Act in his Life, or Will at his death, then the Cuſtome * of the Nation, laid a double Portion on the Eldeſt or firſt-begot, providing for the reſt proportionally.

*Viz. Grounded on the Right of Primogeniture. See Deut. 21. 17. and the *Geneva* note there.

By all which you may collect, that neither the Law of God or Man, in this caſe, commanded that *Eſau* ſhould have the Inheritance, but Power to do the contrary, was given to the Father in his Lifetime, even by the Law it ſelfe. For many Divines hold that *Eſau* ſelling his Birth-right (as it is termed) ſold not Goods, or Lands, but his Claime of being * High Prieſt after his Father, which by Cuſtome was to come to him being his Fathers Eldeſt Sonne. For which Dignity God ſeeing him unfit, permitted him to paſſe away his Right in his Fathers life, as we read in Holy Writ, and which God ſeemed to approve. And thus I hope this Objection is anſwered.

* At firſt, Fathers and their firſt borne after them, were both Kings & Prieſts in their owne houſes: but in Moſes daies, this Prerogative of Primogeniture ceaſed: *Aaron* & his Progeny being inveſted in the Prieſthood, & *Moſes* being *as King*. Deut. 33. 5. (As judicious Mr Godwyn in his Moſes and Aaron. Lib. 1. c. 1.)

Further, if it were true, that the effect of Elderſhip were ſuch by the Law of God, as ſome paſſionately defend, that is, that the whole Inheritance ſhould of Right pertaine to the Eldeſt; then ſure it followeth by good Conſequence, that there ſhould nor ever could have been but one Temporall Lord of all the World. For of Neceſſity *Adams* Inheritance ſhould have gone ſtill to the next in Blood: which how abſurd it is, let all men judge.

Moreover, we read, that *Noë* having three Sons, and the whole world to leave unto them, gave it not All to the Eldeſt, but equally divided it among them & their Poſterity, as all Authentike Hiſtories doe witneſſe.

Againe, God requiring Obedience of Children to Parents, promiſed

promiſed a Reward, ſaying, Honor thy Father and thy Mother, that thy Daies may bee long in the Land which the Lord ſhall give thee; Which ſurely was not ſpoken to one, but to all the Children of men. For with God there is no Exception of Perſons, but as a juſt and pious Father, hee gives every one according to his Deſerts. *Terram autem dedit filiis hominũ.*

We read alſo in Holy Writ, how the Prodigall Sonne being weary of his Fathers houſe, came to him and boldly ſaid, *Pater, da mihi portionem ſubſtantiæ meæ quæ me contingit:* This child of which the Goſpell ſpeakes, was the younger Brother: yet you ſee how boldly he ſaid: Give me that Portion of Goods which belongs to me. By which words it is evident, that a Diviſion or Partition of a Fathers Fortunes was then * in vſe: and that any child as well younger as elder had power by law to demand his Legitimate, or Childs part, according to the nature of the Civill and Canon Law, as you have heard. For the words following in the ſacred Text are theſe, *Et diviſit ſubſtantiam illis.* And hee divided unto them his Living. Thus we ſee, that the privilege of Elderſhip was then excluded; which now in our Country by Cuſtome only, is gotten to be of ſuch Force.

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his Eldeſt Brother, or againſt ſome other of his Brethren, why they ſhould be diſinherited by their Father *David* contrary to the common practiſe of thoſe Times in ſetling Inheritances. But the onely knowne reaſon of this Act in Scripture, was *Davids* Promiſe, made to *Solomons* Mother, together with her great Entreaty made to *David* to performe it. Which ſurely he would not have done, had he not found a lawfull Power in himſelfe, to have executed the ſame.

1. King. 1.

Laſtly, it is invincibly proved out of the Booke of *Job*, who was contemporary with *Moſes* (by atteſtation of judicious Theologians) that there was in thoſe Times and Countries no ſuch Law or Cuſtome, that the Eldeſt ſhould play at Sweepſtake, and all the reſt be left to the foure Windes: for it is expreſly recorded in the laſt Chapter, and the 15. Verſe, that *Job* gave his Daughters, Inheritance *among their Brethren*: Which comes home to the point in Queſtion, and irrepliably evinces a Fathers Power and Right to make ſuch a Partition of his Eſtate among his Children, as upon emergent occaſion, he ſhall judge expedient.

Job. 42. 15.

And thus much concerning what may be ſaid out of Scripture, or Law of God, in our preſent Queſtion.

CHAP. 4.

That Nations beginning to deviſe ſundry Formes of ſetling Inheritances, the Romans eſpecially therein reſpected the free power of Fathers: the right of Children to their Fathers eſtate, beginning onely at their Fathers death.

HAving now declared what the Laws of God and Nature determine of our preſent Queſtion: we intend to examine in briefe, what is commanded by the Law of Man, as well Civill, of other Nations, as Common, of our owne Country. And firſt concerning the Civill Law.

Though all Law, which ever had but the Name or Credit of Law, doth ſurely derive her Originall from the Law of Nature, whereupon *Cicero* many hundred yeares ſince ſaid, that the Ground of all Law-making, is to be taken from the chiefe Law, which was made before any Law was written,

or

or City builded: yet doe they differ much in Forme. For as it is no Law, but Tyranny, which wholy disagrees with the Law of Nature, as *Aristotle* saith: so if it agree in All with the Law of Nature, without limitation or difference, it must of Force be the very Law of Nature it selfe; and not the Law of Man, which surely is nothing else, then a Temper or Forme of Equity drawne by right Reason from the Grounds of Natures Laws; according as Time, Place, and the Natures of Men either gave, or shall give Occasion. For though new Lawes bee daily made of new and severall Accidents; yet all are agreeable to the old and ancient Grounds of Reason in Nature, the Grand-Mother of all Law. Wherefore having before specified what the Law of Nature is touching the point in Question, I shall now declare, what Temper or Forme hath thereto beene added by the Civill Lawyer.

After that Man-kinde was inforced (yet by Natures Warrant) to make (as I have said) a partition of the Blessings of God and Nature: and that Men were possest by the same Right of Goods and Lands which they desir'd to leave to Posterity; Law-makers, and in particular, the Civilian, devised by little and little certaine Formes of Inheritance, and ordination of Heires, at first somewhat rigorous, giving to Parents power of Life and Death over their Children, and a free disposition of all their Fortunes to any one of them in his life: but dying intestate, then all which was the Fathers, to be equally divided among the Children, as well daughters as sons. Which Constitution was afterward upon good grounds altered: the Father being bound to leave every child a Portion, which the Civilian cals a *Legitimate*, Others a Patrimony; which at first, was the eight part of the Fathers substance, equally to be divided (as hath beene said:) which after a while seeming litle, the Law commanded that the Fourth part should be left without Controll: except upon just cause the Testator did disinherit him or them who by course of Law were to succeed him: still upholding the former Lawes, that as well daughters as sonnes, should equally succeed their Parents dying intestate, Herein assigning fourteene causes why an Heire might lawfully be disinherited.

Many hundred yeares passed from the establishing of the

Civill Law, before it was ordained by force of Law, that Parents ſhould leave a Childs part (as it is now called) or that they could not diſinherit, without expreſſing the cauſe thereof in their laſt Will: yet, in all this Time, nor till this preſent Day the Privilege of engroſſing all by *Primogeniture* was not once heard of, or at leaſt wiſe not admitted, but rather excluded; as by many Texts in the ſame Law it well appeares. The End of the Imperiall or Roman Civill Law, being only to maintaine Morall Juſtice in three ſhort Precepts, *Live honeſtly. Hurt no Man. Give every one his owne.* So that hee who obſerves theſe three, fulfills this Law, yea the Law of Nature, whence this Law is derived. Now, if any Brother can prove; that his Father either in his life by Deed, or by Will at his Death, diſpoſing of his Goods and Lands no otherwiſe then I have declar'd, doth no act againſt theſe three; why ſhould he not content himſelfe, either with the Fruits of his Fathers love, or his owne Deſerts what ever they bee.

True it is, that in Naturall Juſtice, children during their Fathers life, have *Jus ad rem*, not *Jus in re* to a Fathers Goods. Whereupon the Law calleth them *quaſi bonorum Patris Dominos.* Which their Right only takes effect after their Fathers Death. For during life, he hath power to alter, alien, ſell, & give, as it ſhall pleaſe him, according to forme of Law: but being dead without Will, or diſpoſition thereof, they fall upon his children, according to the Law of Nations. This Law embraceth a twofold Juſtice, the one in Exchange, the other in Diſtribution. The firſt hath not to doe with our cauſe: The other * rather commends then condemnes a Father who upon good Occaſion, that is, for the bad Demerits of his Eldeſt Sonne, and for the preſervation of his Family, ſhall give or convey his Lands or Goods to the Younger. For the Nature of diſtributive Juſtice, is not only to give proportionally to the well-deſerving: but alſo to forbeare to place Benefits upon any one who ſhall abuſe them: or uſe them to any other end, then to that good for which they were lent, & hee ſhall leave them. And this is *Jus ſuum unicuiq; tribuere.* For no man can give or ſell his Goods to an evill end, or to any one, who he aſſures himſelfe, will uſe them to the Diſhonour of God, or the Wrong of thoſe who ſhall live with him,

* This warrants not the injurious Abdication of unnatural Parents; (irremediable by the common Law: as is alſo the oppreſſion of Orphans by lewd Step-fathers & ſharking Executors.) See D. Ridleys View (republiſht by a learned Student of the Royall College of Chriſt Church Oxon. part. 4. §. 1. & 2.

or

or by him whereof I will treat more in the ſeventh Chapter; being then to handle, what a Father may in Conſcience doe or not doe, in our Preſent Queſtion, with ſin & without ſin. And thus much of the Civill and Canon Lawyers Averment of an Elder Brothers Right to his Fathers Fortunes.

CHAP. 5.

That the preſent cuſtome in our Country of giving All, or almoſt All to the Eldeſt, was never ſo begunne, that it meant to exclude juſt Remedies for ſuch Evils, as ſhould grow out of the abuſe of that Cuſtome, when it may make Fathers guilty of their Sonnes faults, and of their Families ruines.

I Have purpoſely reſerved to treat of the Lawes of our Country in the laſt place, becauſe (I aſſure my ſelfe) they are of moſt force to ſway the Point in queſtion. For many things may be permitted by the Lawes of God and Nature, and yet contrarily prohibited, or practiſed by courſe of Law, in ſeverall States of the World, as the Law-makers and Cuſtomes of Countries allow or command. I confeſſe, the generall Practiſe of our Time among Parents, is to leave either All or moſt part of their Lands to their Eldeſt Sonne. This queſtion leſſe (as hath beene ſaid) was firſt deviſed in former Ages, for the Preſervation of a Family, and to raiſe One who might bee a Comfort to his Brothers, Siſters, and Family, and in whom his Progenitors Vertues might live to the World. And I will not deny, but the Partition of Lands, may reduce in the end, a good Eſtate to Nothing, or to ſo little, as it may be like an Atome in the Sun: yet I finde in Natural Reaſon, that, *ex nihilo nihil fit*, or at leaſt, that

Haud facilè emergunt, quorum virtutibus obſtat Res anguſta domi.

But if Men faile of thoſe happy Ends, to which this generall Cuſtome ſhould guide, then could I wiſh, that they would not uſe That for their Deſtruction, which was meant for their Preſervation. For who ſees not, in theſe our Times, many unbridled youths ſo violently carried away with the humour of ſpending, that they neglect Brother and Siſter; yea, bring

Geſſante ratione, ceſſat Lex,

to extreame misery their Naturall Mothers after their Fathers Death, by their unchristinesse. What help for this hath Law left unto us? No meanes to bridle these unruly Colts, if they become Heires according to the custome of our Time? No truly. For some starting-hole will bee found, to unty the Knot which a Fathers care once tied. How then? Must many a hopefull and well-deserving Brother and Sister, be left to the Mercy of this Whirlewinde? There is no Necessity. For our Law hath given Power to a Father, and Freewill to dispose of his Owne, according as Reason shall guide his Will, without all obligation to his Heire. Besides, this Custome takes place only after a Fathers Death, if he dispose not what is his by Deed in life; or by Will at his Death. But lest my Words bee more generally taken, then they are meant; I mean those Fathers, who are possest of their Lands in Fee, or Fee-taile: that is, are absolute of themselves, and have not upon good Consideration convaied their Lands from themselves. For all our Lawyers agree, that such Parents may alien, sell, & give, by power of our Law, their Lands to whom they will, without respect of Person or Eldership.

But may some say, the Custome is otherwise, and this Custome is a Law. True, it is the Custome: But let us see, whether it binde *sub peccato*, or as a Custome, which rather invites then commands. There was never any Command to tye a Father under a Penalty, which admits no limitation, but it was ever left indifferent, and then only to take place where former Provision according to course of Law is not made. Then surely a Parent is free from this devouring Custome, & may considerately prevent what Evill it may bring to his posterity: yea, Reason commands it should be so. For, *Interest Reip. ut quilibet re suâ bene utatur*: It concernes the publike State that Men be *Good Husbands*, saith the Civill Law. For if a Man can neither sell, nor set, much lesse can he give any thing to another, which he thinkes in his conscience, will use it to the Dishonour of God, and the Ruine of himselfe, or others.

Divines hold, that it is not lawfull to sell or let a house to any that hee thinkes assuredly will make thereof a Stewes, or to sell, give, or lend a Weapon to a man who intends therewith

with to doe murther. Excommunications are impoſed on them, who ſell Armes Offenſive, or Defenſive to *Turks*, though they bee not aſſured, they will uſe them againſt Chriſtians.

Thus, we ſee, the Rule of Concience, not onely commands a man to uſe wel thoſe Fortunes which God hath beſtowed on him; but forbids him, either upon Affection, or Gaine, to part with them to others who will abuſe them, leaſt hee partake of their ſinne: which a Parent may doe after death, who leaves his Lands to a deſperate Unthrift. But, what Religion and Conſcience commands, ſhall be declared in the following Chapter. In which, upon Principles drawne from the former Concluſions, ſhall be argued, what ſinne may bee contracted by the parting an Eſtate among Sonnes, or by diſinheriting an Eldeſt ſon upon juſt Cauſe; and to whom the Father is onely tied by the Cuſtome of the Countrey, without Obligation of Promiſe, or Contract in Marriage, which may alter the Caſe.

CHAP. 6.

That it is no offence before God, for a Father being Tenent in Fee-ſimple, to diſinherit the Eldeſt, or to parcell his eſtate upon cauſe: and that extreame vices of Heires Apparent, together with the fewer meanes which younger Brothers have now to live on, then heretofore; crye out againſt the contrary opinion.

THe Right of theſe *inſociable Inheritors*, of which we now treat, may grow (as I conceave) from three Titles or Claimes, which they may pretend to a Fathers Inheritance, and whereby it may be deemed (as they thinke) ſinne in a Father, upon what Deſert ſoever, to barre them of the ſaid Right. Theſe three Titles, are *Purchaſe*, *Cuſtome* and *Entaile*. Of each ſeverally. And of the firſt, which is *Purchaſe*. Surely in the Judgement of the Good and Learned, there is no queſtion in Law, or Conſcience, but that a ſonne joyned Purchaſer with his Father, hath *Jus in re*, and by Equity muſt, ſurviving his Father, inherit ſuch Lands as were purchaſed in their Names.

Now

Now of the other two, though it be as cleere as Noone-light, that a Lord in Fee-ſimple, or Tenent in Taile, may ſel, or give by courſe of our common Law, at his pleaſure all ſuch Lands held by him, in that kind, according to thoſe formes of Law, which the learned in our Lawes have, and can ſet downe: yet there ſeems to ariſe a great Difficulty, how ſuch an Act or Acts may in Conſcience be executed. I have heard ſome ſay, in this our Caſe *ſummum ius, ſumma injuria.*

Of theſe Points therefore I will ſpeake (*Salvo meliori judicio*) what may in Conſcience, upon good and juſt Occaſion given by the Sonne to his Father, bee put in Execution. It is well knowne to all Divines (as I have ſaid) that Holy Writ hath not preſcribed any direct or preciſe Forme to the Children of God, whereby they are bound in Conſcience to diſpoſe of their Lands and Goods, but hath abſolutely left them to the Cuſtomes of their Country, where any Act of that kinde ſhall be executed; only as confirming all Formes of Deviſes which by publike Conſent, and Authority, either have, or ſhall in rightfull manner bee deviſed or ordained.

Out of this Ground and others prementioned, let us examine, whether a Father parting his Fortunes by Power of Law, and on juſt Cauſe, ſhall do a wrongfull and ſinfull Act, as ſome would make it. I confeſſe, that every Act in it ſelfe, or by circumſtance evill, and which upon no occaſion can be juſtified, is both before God and Man, ſinne, and by no meanes to be executed by a Chriſtian. But that the parting of an Inheritance, or Diſinheriting of an Eldeſt Sonne, upon *juſt, and evident cauſe of incapacity*, and according to *Courſe of Law*, is an Act of *that Nature*, doth not appeare. For I finde not, that either the Law of Nature or Grace, nor yet the Lawes of Man, Common, Civill, or Canon, ever forbad ſuch Acts, whereby ſinne may bee imputed to thoſe who doe them on good Conſiderations. Sure I am that the Canon and Civill Law are ſo farre from forbidding them, that they command, as a Thing in Equity, the Father either to divide his Inheritance, or allow him according to his Affection, to give to one more then to another: yet with this Proviſo, that hee who hath the leaſt, have his * Childs part; which the Law doth alſo aſſigne, except on juſt deſert he diſinherit any one: which

* Or lawfull Portion: See pag. 61. of Dr Ridleys View illuſtrated by the judiciouſly-learned Mr. Gregory.

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at this day may, yea must bee by Will, with the cause of Disinherison therein specified. Of which Causes the Imperiall Lawes have set downe foureteene, as may well appeare to them who are desirous to understand more thereof. So it is evident, that by these two Lawes, no sinne can grow upon such Acts, being done upon their Warrant, and upon such Consideration, as is formerly delivered.

As for the Common Lawes of our Realme, sure it is, they allow no lesse, and with a greater Privilege. For a Man may by this Law, give his Lands held in Fee, either by Deed in his life, or by Will at his death, to any of his Children, yea to a stranger, without rendring a Reason why he doth so. True it is, that a Father not disposing thereof in such sort, Custome gives the whole Estate to the Eldest: yet in some part of our Countrey, the youngest Brother, by custome is to have the Land, held by some kind of Tenure, if the Father in his life-time dispose not thereof.

As yet therefore I cannot see, how any sinne is committed, or contracted by the former Acts, being neither done against the Law of God or Man, as we have proved: unless it should be said to bee sin, not to leave it to the Power of a Custome: which cannot be, except the former Law shall bee proved not to be of Force, and not to be executed; which can no way be done: Though I must confesse, that the Custome of leaving the Child-estate to the Eldest sonne, hath of latter Times beene much imbraced by our Gentry, for the preservation of their Families, for which it was invented. For the Times have so ruled, that Men of sort, being either idle, or not possest with a covetous Humour, have contented themselves with their Fathers Fortunes, and prefer'd their younger sonnes by those meanes which the Times did afford: namely, by many commendable Courses; as either by service of spirituall and Ecclesiasticall Persons, whereby many were raised: or by professing a spirituall Life, whereby the younger Brother hath oft-times in Honour stept before the Elder. But this manner of Life, is not so gratefull to our English Gentlemens Natures, as anciently it hath beene.

The Trade of the Marchant, the Military profession, the Courtiers life, advanced many more, then now they doe; and lastly,

Elder Brothers in former Ages were (generally) of better Temper in ſpending: and if they had no humour to get, yet had they a care to keepe what was left them: and ever held themſelves bound by Religion to provide for their younger Brothers and Siſters left to their Diſpoſe, *which now is far otherwiſe. For ſome Elder Brothers are found to ſpend more in a yeare idly, then would prefer or maintaine a whole Family Nobly: and to ſuffer their Brothers and Siſters to* ſhift, *which as theſe Times ſhape, is oftentimes to live either* lewdly *or moſt* miſerably: * *being forced either to forget their good Education, or to lay aſide all Badges of Gentry; who otherwiſe with ſome* reaſonable helpes, *might doe God, their Country, and Family much Honour.*

* Strenuè eſurire.

Since we have gone ſo farre, let us ſee, on what Ground this Cuſtome firſt hath riſen. Surely for the maintenance of a Family, yet led with an Ambition at the Example of Princes, who finding ſome difficulties, in the admitting of many to a Government, and feeling what Inconveniencies the parting of an Eſtate, brought; deviſed that One ſhould governe: ſometime the Worthieſt, ſometime the Eldeſt was Elected, according as the Order was agreed upon, and yet the other Brothers were maintained like Princes. And this Cuſtome alſo among them hath beene broken, without Imputation of ſinne: For to goe no further then our late Times: 'tis well knowne, that *Ferdinand* (*Charles* the fift his Brother (being ſetled in the Empire, divided his Eſtate. To *Maximilian* his Eldeſt ſonne, he left the Empire with *Auſtria, Hungary,* & *Bohemia.* To *Charles* his ſecond ſonne, *Stiria, Carinthia,* and other Dominions. And to *Ferdinand* the youngeſt, he gave the Earledome of *Tyroll.* All which, if in his life-time hee had not diſpoſed, had come to the Eldeſt. Alſo *Philip* the ſecond, late King of *Spaine,* gave to his Daughter the 17 Provinces, which were *of Right* to have deſcended to his ſonne after his Death, if otherwiſe he had not diſpoſed in his life. And this was adjudged lawfull by Grave Divines, otherwiſe ſurely they would never have done it.

But doth this Cuſtome in meaner Degrees work that Effect which it hath done in them? No truly. For as we have proved, it is rather the Overthrow then the Preſervation of many Families. Let us ſee withall, whether Families flouriſhed not

as

as much, and more then now they doe, before this Cuſtome was receaved.

Livy ſaith, that three hundred of the *Fabii*, all of one Name and Family, iſſued out of *Rome* Gates at one time, on their owne Coſt, for Defenſe of their City: which was done, before this Cuſtome was dream'd of. *Vna dies Fabios ad bellum miſerat omnes* Ovid. Faſt.

In Scotland three hundred of the Name and Family of *Frazers*, Gentlemen, were at one Time ſlaine in Fight by their Enemies Neighbours: and 140 Gentlemen of one Name in Yorkſhire, waited on their chiefe or principal Man of their Houſe, at that time High Sheriffe. In other Coutries, many Noble Families from the Romans downeward, have continued where this Cuſtome hath beene deemed unjuſt, as by their Laws is manifeſt: whereas in our Country, in theſe our Times, if there be one Family in a Shire, which is of three hundred yeares continuance, very many others are ſcarſe of five Deſcents in a Blood.

Why ſhould our Age then, ſeeing the Fruit of this Cuſtome to be ſo ſmall, embrace it with ſuch Zeale as to deeme the Breach thereof, being warranted for Good and Juſt by the Law of God, Nature, and Man, to be a ſinne? Is it held both lawfull and expedient (in ſome Countries) for the preſervation of a Family, that Degrees of Kindred ſhould be diſpenſed with to marry, contrary to Eccleſiaſticall Canons and the Generall Practiſe: and can it be lawfull before God and Man, for the preſervation of our Goods, to venture our Lives, & to kill a Theefe, who ſhall aſſault us, and that perhaps for a Triſle; and yet that for preſervation of our whole Eſtate, & perpetuity of a Family, it ſhall bee reputed ſinne, to breake a bare Cuſtome, under no Penalty Obligatory, yea alwaies allowed by Law? Never was it heard, that a Cuſtome * was of ſuch force, to abrogate a Law ſo farre, that it ſhould bee deem'd a ſinne to follow the ſaid Law, though it have Power to diſpenſe with the Law, which othewiſe to infringe, were ſinne: eſpecially when as the Law is both more pious & more naturall then the Cuſtome is. For how farre is it from the Law of Nature, and from the Practiſe of Paternall Piety, the Father dying inteſtate, the Eldeſt ſonne to become Lord Paramount of all his Fathers Land, and not to be bound by Law

* *Cuſtomes againſt Lawes, are void by the Civill Law.*

to provide for Brother or Sister, but at his owne good liking? *Aliud Tempus, alios mores postulat.* Men of Vertue, Men of Learning and Vertue, both now and in former Ages, in this our Countrey, have brok this Custome,* as the World knows, upon good Consideration, & just Causes, not upon spleene, or false suppositions persuaded to leave their Fortunes to Strangers, or to a lustfull Issue, as some have done.

*This Custome is contrary to the judgement & practise of the Primitive Church: as is cleare in *Salvianus*; who intimateth, that *æqua hæreditatis portio* was usually left by Christian Parents to their Children, and that to doe otherwise, were *Grosse Iniquity*: *Ad Eccles. Cath. pag.* 422. 425. *Edit: Oxo: Floruit: Ao* 480.

CHAP. 7.

That Fathers being Tenents in Fee-taile, may likewise without scruple of Conscience, discontinue the State-taile upon cause; and devise the same at their reasonable pleasure.

HAving treated largely, and (as I presume) proved sufficiently, that Lands held in Fee-simple, may either bee parted, or upon just Cause wholly given away to a younger Sonne: I intend now to speake of the lawfull Freedome of a Father in like sort, and on the same causes, moved to dispose of his Lands entailed: of which there seemes more Doubt then of the former.

Every humane Act, which of it selfe is not forbidden by the Law of God or Nature, is to bee judged Good or Evill, Lawfull or Unlawfull, either by the Lawes of the place where the Act is done, or by Intention of him who shall doe the Act. For as the Divine Law commands some things to be done, and other things to bee avoided, under paine of sinne: so the third sort of Actions are left free (by the said Authority) from sinne, except the Law of Man prohibite them, and so make them sin: or else evill Intention make them (being of themselves lawfull) to be a sinne, and unlawfull, according to that Principle of Morall Philosophy, *Finis specificat actum.* For as an Act of it selfe lawfull, done against Law is Sinne: so a good Act commanded by Law, yet done with an evill intention, may be sinne.

From

From theſe Grounds, let us ſee, whether the Common Law of our Country, and the Intention of a Father (which are to bee the Judges of our Cauſe) can allow the cutting off an Entaile, the parting of an Inheritance, or (upon proportionable cauſe) the diſinheriting of a Son. Firſt it is cleere, that the Act, of it ſelfe, by Law may be done: But whether ſuch an Act bee *ſummum Jus*, which may be *ſumma injuria*, that is the Doubt. What ſhall be the Triall? By other Lawes, it is either made lawfull, or left indifferent. Our Law which makes this Tye, gives leave to undoe it without any exception. *Ergo*, to a good End, and upon juſt Cauſe, it may be done. It will bee replied, that the Eldeſt ſonne, during this Entaile, is *quaſi Dominus*: Yet, having neither *Dominium directum*, nor *indirectum*, he, during his Fathers life, hath onely *Jus ad Rem*, and not *in Re*: Whereby no change is forbidden to be made by the Father, according to the Forme of the Law under which he liveth, and by which, the ſonne is to make claime, if the Father create no new Eſtate in his life. For it is lawfull for every Man to diſpoſe of his Owne, as far as the Law ſhall permit him, if it bee not forbidden by ſome other Law: but ſuch an Act is not forbidden by any other Law. *Ergo*, 'tis lawfull, and no ſinne.

But it may bee ſaid, that the Intention of him who entaild the Land, was, that it ſhould not be untied: or the ſtate changed. I anſwer: No Act done by law, can be free from Change, further or longer, then the Law that made it a binding Act, ſhall allow. And it is well knowne to the learned in our Lawes, that every Mans Intention is to be conſtrued according to Law, by which, his Act and Intentions are directed. Whereupon, *Civilians* ſay in like Caſes, *Valeat quantum valere poſſit*. Neither is it thought, that any man who conveieth his Lands by Entaile, can intend an Act beyond Law, or deſire that his ſonne whom he makes Tenent entaile (as our Lawyers terme him) ſhall in no Caſe, no not for the preſervation of his Family, or Releeſe of many other of his Children, have power to cut of this Entaile, and to be able to alien, ſell, or give his Lands, as Reaſon, Law, and Religion ſhall permit. For it may be judged, that bee who doth an Act to a good End, as namely to preſerve his Family, will

alwaies assent to another Act, which shall with better assurance then his owne, strengthen his Intendment.

To the former Considerations wee may adde, what Inconveniencies may follow this Generall Position. For if in conscience the whole Inheritance of the Father, is to come without controle to the Eldest sonne, then must it of necessity bee inferred, that the Father, without his Consent,* cannot give to pious * Vses, or set out for the Advancement of his other Children any thing after his Death. So that if God should blesse a Father with many children, & crosse him with as many Misfortunes; his other Children, and all other his charitable Intentions should be provided for only at his Sonne's or Heire's curtesy. Which how * absurd it is, all men know. For hereupon all Donations to pious Vses, and to younger Brothers for their preferment, may be called in Question.

* *Agent per medium, est minus efficax in agendo.*

* Da qua non potes retinere, ut consequaris ea quæ non potes amittere.

It is an ordinary thing in these our Times, when the Land is left to the Heire Generall, to alter the Estate, if the Land so convaied shall come to Daughters, and to leave it to a Brothers † Sonne, or some other of the same Name (though peradventure many Degrees removed) for preservation of the Name and Family. If this may bee deemed lawfull, and no sinne, being done against a well deserving Child, for whom, Nature and her Deserts plead her worthy to be her Fathers Heire: then without all compare, if the preservation of a Name and Family, may justly be labour'd for, according to Power given by Law of God and Man, the same may be lawfully acted, against a debauched Heire, who in any reasonable Mans Judgement, is likely in his shrowd to bury the Memory of all his Ancestors Vertues, which should live in him, and his Progeny, as his Progenitors did in theirs.

* *Pediſſequa enim plerumq; novi honoris, eſt Arrogantia* Salv Ep. 2.

†Hebrewes call a Male Child *Zacar*, a memoriall: because the Fathers memory is preserv'd in the Sonne, See 2. Sam. 18. 18.

It is neither new, nor strange, in the Practise of our Times, in Causes of this Nature, to overthrow intended Perpetuities, and by Act of Parliament to give leave upon some good considerations to sell lands, which otherwise by no Lawes can be sold from the Heire, the Father being but Tenent onely for terme of life. Which surely by no Power under God could be done, were the Thing in it selfe, unlawfull and sinne, for * *Omne peccatum eſt Divinitatis injuria*: Whence may bee argued

*See Salvian ad Ecc. Cath. l. 4.

argued *à Fortiori*, If power may be given to a Father being Tenent for Terme of life, to ſell his Sonnes lands, only to pay his owne Debts (peradventure idly made) though it be to the Overthrow, or extreame Diminution of his Family; becauſe Naturall Equity doth will, that every one ſhould be relieved with his Owne, (for ſo it may bee deemed, though in love to his Child he hath paſſed the Eſtate, yet ought hee to be therewith preſerved from Thraldome in his Neceſſity:) Which if it be ſo, (as confeſſedly it is) how reaſonable a thing, yea how commendable, and *far* * *from ſinne* is it, for a Father truely Lord of his owne, without all Tie of Law, Divine, or Humane (as I have proved) to diſpoſe his Lands, to the Honour of God and Comfort of his Family, to a Younger Sonne, *when in all probability, the Elder will neither uſe it to the One nor the Other, but rather, to wallow in Riot and Senſuality.*

* So *Salvianus*: *Non injuſtè teſtator ſapiens non relinquit, quod hæres impius non meretur.* Ad Ecc. Cath. l. 3.

CHAP. 8.

That Unthriftineſſe is one knowne name of many hidden ſinnes; and is alone a ſufficient cauſe of diſinheriſon, proved by the Law of God and Man.

HAving upon good Conſideration enlarged my ſelfe beyond my firſt intention, I have reſolv'd, under my Readers Favour, and on the precedent Principles, to Argue one Queſtion more, for the accompliſhment of this Diſcourſe: viz: *Whether a Father may diſinherit his Eldeſt Sonne or Heire at Common Law, for ſuch an Unthriftneſſe, as in moſt mens* * *Judgements, is like to bee the Ruine of his Family?*

* Viz. Grounded on the concurrence of great and violent Preſumptions.

Though many foule ſinnes, beſides the Abuſe of Gods Bleſſings, bee concomitant to unthriftineſſe, yet becauſe they are not apparent to the World (*& de abſconditis non judicat Prætor*) I will briefly argue, Whether in Reaſon, or Conſcience, a *deſperate Unthrift* may be diſinherited.

It is well knowne to all the Wiſe and Temperate, whoſe Judgements Paſſion doth not over-ſway, how great an Enemy Prodigality or Unthriftineſſe is to all manner of Goodneſſe: and how cunningly ſhe not only hinders the Increaſe

of

of all Vertues in those in whom she raignes: but also unjustly ofttimes cuts off the vertuous reward of many a worthy Predecessour; yea, gives occasion to the Evill to detract, to the Good to suspect their Deserts. All which, how great a Wrong it is to a Noble Family, I leave to the indifferent Reader to censure. I will not deny but there may bee many sinnes in a Man, which in the sight of God, and judgement of Men, of themselues are more haynous, and deserve a sarre greater Damnation then Prodigality doth: yet are sinnes in this World to bee Punisht, not as they are in themselves, but as by Circumstances they are offensive to the Society, Peace, and Honour of Man-kind, which God and Nature, ever as the Reward to all Morall Vertues, and as the cheefe End of Mans Life, intended. For otherwise, Usury, Detraction, Forgery, Adultery, Fornication, Swearing and Drunkennesse, with many more, which are as greevous offences in the Eye of Heaven as Theft, should be punisht with Death as Theft is. But since they offend not so much the Peace of a publike Weale (at which the Civill Magistrate aymes) as Theft doth; they are not censur'd with such severe Punishment as it is. All which shewes directly, that Offences by Circumstance are made in a Civill Society against which they are committed, either greater or lesser; and are accordingly to be punisht: and no lesse doth the Reason and right Rule of State command.

Those sinnes more punishable, which are more offensive to common Society; though lesse heinous in their particular nature.

Out of which Grounds it is evident, that all Formes of Goverment doe most punish that Offender, who directly or indirectly seekes to disturbe the Peace, or overthrow the Liberty, or disgrace the Dignity of the State where he lives: yet many greater Offences then these may be committed, as Incest and Apostasy, which are not so sharply punisht by the Civill Magistrate. For every one to whom God hath given power on Earth, doth chiefly seeke the End, for which his Power from above, is given to him; and doth censure and Punish in the highest Degree, those Offences, which tend to the Overthrow of a well setled State, by good & lawfull Power confirmed.

Now to descend from these Premisses to the Point in Controversy, and to apply what hath been said, to our purpose.

It

It is well knowne to the World, that a Family is a Civill Society, yea the only Common-Weale which God and Nature first ordained; from which, all Societies, Republikes, & *Species* of Regiment tooke their Originall. For the maintenance of which society, there is no Queſtion, but God hath given many * Privileges to a Father, as well to reward the well-deſerving, as to puniſh an evill child or member of his Body: not only by depriving them of their expected Fortunes; but by cutting them off from his Body, either by Abdication or Exile, or Death it ſelfe. For it is cleere by the Civill Law, that a Father had for many yeares, not only free Power to diſinherit, but alſo Power of Life and Death over his Children, who ſhould greivouſly offend him or his, living under his Civill Government. But ſince that Things unknowne are growne out of Life, and may ſeeme as well incredible, as ſtrange, I cannot in prudence paſſe over the Matter in Queſtion ſo lightly, as that it may bee worthily ſubject to ſharp Cenſure, or raſhly branded with the Marke of Untruth.

* Fathers of Families had power to bleſſe, curſe, *diſinherit* & puniſh with *death*; as appeares by the Examples of *Noë* towards *Cham*, *Abraham* towards *Hagar* and *Iſmael*, *Jacob* towards *Simeon* & *Levi*, & of *Juda* towards *Thamar*. Gen 38. 24. See Mr. *Godwin*, *ubi ſupra*

Therefore laying aſide the Teſtimony of the old *Romane* Lawes, in the caſe of a Fathers Soveraigne Power over the life of his child, given to him by the * *Twelve Tables*, where it is written: *Pater familiæ habeat jus vitæ*: yea, —*terq; filium venundandi poteſtatem*; I will breefly and effectually prove out of the *Sacred Text* it ſelf, what I affirme. There then it plainley appeares, that Fathers had Power among the Jewes, to cauſe their children for Riot, Diſorder, or Unthriftineſſe, to be ſton'd to Death: *Ergo*, power to diſinherit: For the Greater ever includes the Leſſe. Not to ſeeme to ſpeake without Booke, it ſhall not bee amiſſe to ſet downe *Moſes* words, which are as follow.

* Cap. 3. Dio. Halicar. l. 2 Antiq.

*If a Man have a ſtubborne and rebellious ſonne, that will not obey the Commandment of his Father or Mother: and being chaſtiſed, ſhall be unreclaimable; they ſhall apprehend and bring him to the Seniors of that City, and to the place of Juſtice: and they ſhall ſay to them: This our ſonne is incorrigible and diſobedient, contemnes our Monitions, abandons himſelfe to riotous Exceſſe, & is a Drunkard. The Citizens ſhall then overwhelme him * with* Deut. 21. 18.

* Stoning was appointed a Death for Blaſphemy & Idolatry: which (by concurrence *in this caſe*) argues how execrable a Crime *Diſobedience* to Parents is in Gods ſight.

Stones, and he ſhall dye; that yee may take Evill from among you, and that all Iſrael hearing it, may feare.

Whence we may collect, how odious a Crime Unthriftineſſe was among the People of God; and what ample Power the Father had to puniſh the ſame in his Child. For if we obſerve well the Manner of the Proceſſe betweene the Father and the Child, in this Caſe, wee ſhall finde that the Father was Accuſer, Witneſſe, and as it were Judge of his owne Cauſe. For we read not that the *Senators* of the City did give ſentence, or further examined the Prooſes of the Fathers Accuſation: but their Preſence giving as it were Allowance to a Fathers Power, and Intention to puniſh his Sonne, the people might without more Enquiry, ſtone to Death ſo evill a deſerving Child. Which being well conſider'd, my Hope is, that it will never hereafter ſeeme Unlawfull, though ſome what ſtrange, that a Father ſhould diſinherit his Eldeſt, or any other ſonne of his, for the Cauſe only of Unthriftineſs.

And although the World of Men is growne to that Greatneſſe, that it is neceſſary, One Generall Father, or Politike Head ſhould be in a Kingdome, or State, which may juſtly abridge ſome of theſe Privileges, and abate a Fathers Power (all Fathers being Children to the Father of their Countrey, their Lord and King, under God) yet the Power to advance and maintaine a Family by good and lawfull Meanes, is ſtill both allowable and commendable in a Parent; who may from time to time reward according to diſtributive Juſtice, all thoſe which live under him, by leaving his Fortunes to them, as in Juſtice they ſhall deſerve, and Law ſhall allow. So that, there is no Queſtion, but hee may ſtill diſinherit, according to the power of that Law under which he lives. For no other Ty is over him: God and Nature * allowing that, at this day, and forever, which once they gave unto him. Which Authority he not only may, but ought alſo to execute, as farre as the Law of Man ſhall permit: otherwiſe he ſhall erre in his Paternall Juſtice.

* The Law *of Nature*, or (as Civilians ſtile it) *of Nations* [on which a Fathers Plenary Power is founded] is by S. *Paul* expreſly termed *The Law of God* Rom. 1. 31.

For a Father is not only to beget and nouriſh his Children in his life, but by Natures law muſt provide to his Power, that they live both in his life and after his death, to the honour of God, the ſervice of their Countrey, and comfort of their

their Family: which were the only Ends for which God created Man a Civill and rationall Creature. All which, if it ſhall aſſuredly bee thought by a Father, that any Child of his will wholly neglect, or rather execute the contrary; then no queſtion, a Father is not bound to leave him any more then ſhall honeſtly ſuffice the Neceſſities of Nature. For (as before is ſaid) no Man may give or lend his Goods to any one, who will in all Mens Judgements aſſuredly abuſe them.

But let us ſee, whether a *deſperate Unthrift* may be arraigned, and adjudged Guilty of theſe Accuſations. Surely, it is cleere, that all unthrifty *courſes are diſpleaſing to God, and contrary to his Honour. And how can hee bee able to ſerve his Country, who in ſhort time will not bee able to ſerve himſelfe with Neceſſaries wherewith to live, but muſt of force bee maintained like a Drone in a Common Wealth, out of others Labours. As for his Family, what greater Diſcomfort can it have then an abſolute Overthrow? Whereby, the Noble Acts and Honour gotten to it by vertuous Predeceſſors, are buried in Oblivion; and the preſent and future Hopes of all worldly and lawfull Honours (Vertues temporall Reward) are quite taken away. And ſhall not ALL THIS deſerve Diſinheriſon? Can there bee a greater ſinne committed againſt the Honour and Eſſence of a Family, as it is a Family, then to be ſpoil'd of its Honour, and Life it ſelfe? For "in theſe our Times, well gotten Goods, and uſed as they "ought, are the onely Soule, by which a Family, and all the "vertuous Acts which it hath done, may live.

* *To play away our Prædeceſſors labours; is a greater diſhonour, then to piſſe on our parents aſhes or raze their monuments* Carp. Achitoph. p. 3.

The life and ſoule of a Family.

Since therefore ſo great a miſchiefe is ſought and aim'd at in this ſinne, ſurely according to the proportion of diſtributive Juſtice, the greateſt puniſhment is in Equity due to the ſame, according to the reaſon of the Precept, *Jus ſummum vnicuiq; tribuere*. Nature teacheth the ſilly Bees in their Common Welth to do to death their *Drones*, who live of others Labours: and ſhall it bee thought unlawful for a Father, ſo to puniſh and incorrigible Unthrift, who will not only live of others Labours, but alſo ſubvert the honourable Endeavours of his Noble Anceſtors?

Thus if Sonnes may be deemed, and doomed by the offended, having power to doe both, according as the Offence done

againſt them ſhall (by circumſtance) be of Quality (as we have proved they may and ought) then certainely it is lawfull for a Father ſo to doe, as I have formerly demonſtrated.

But becauſe Examples in all Controverſies of Fact, are the beſt Fortifications; I will, in illuſtration of the Premiſſes, adde ſome few to the former, drawne as well from Royall Precedents (by whoſe Patternes —*totus componitur Orbis* (as from inferiour Perſons, whoſe Qualities beſt fit the condition of our preſent ſubject. And if Kingdomes and Common Weales have favour'd it, then certainely, by all Arguments *à majori ad minus*, it may much rather be done, and ought to bee ſuffered in private Families.

CHAP. 9.

The main points of the Premiſes exemplified in divers particular Facts, as well of Princes, as of private Perſons.

Temporis prælationem tulit improbitas: Dignitatis prærogativam virtus. Philo: *de Caino & Abele.* Abel. Japhet.

IT is not fit perhaps to urge the better Acceptance with God of *Abels* Offering above *Cain's* the Elder Brother; but that Eſtate which *Abel* had in *Adams* Patrimony. Nor will I reinforce *Japhets* ſhare in his Fathers Right to the whole World, though hee being the youngeſt Son of three, had *Europe* for his Inheritance, which in all Arts, and Uſes of Life, farre excells *Africk*, *Aſia*, and all the reſt of the Earth: Whereas, according to the pretenſes of thoſe cuſtomary challenges, *Sem* ſhould either have had all, or beene Soveraigne Lord of all, & *Cham* and *Japhet* with their Poſterity, but Farmers, or Freeholders under him.

* In this caſe God ſaid expreſly, *The Elder ſhall ſerve the yonger.* See Gen. 25. 23. and Mal. 1. 3. (with the *Geneva* Note there.)

I will not alſo (as if there were penury of Reſemblances) produce againe *Eſau's* Diſinheriſon, though that * were enough for our preſent purpoſe. For had it beene Sinne (which neither Scripture, nor *Joſephus* in his Antiquities ſaith) the Mother could not have procured it, God would not have proſper'd it; nor *Jacob* himſelfe, being a good man, have accepted it, nor *Eſau* (whoſe anger *Jacob* feared) have left it unrevenged. Neither is there in Scripture, nor in any written Law under Heaven, any Command to reſtraine the Fathers Power, but rather the contrary. For ſuch is the Law

of

of Nature, that they who are *ex æquo* one Mans Children, ſhould, if not *ex æquo*, yet not *ex iniquo*, bee provided for.

Againſt which Partiality, the Imperiall Lawes admit ſo forcible a Remedy, under the Title of an *inofficious Teſtament*, as it ſhall inable the younger Child, to a certaine proportion of eſtate, whether the deceaſed Father would or no, if hee had no juſt reaſon for omiſſion, or diſavowment in his laſt Will. The Example certainely of the ſame holy Patriark, *Jacob*, in depriving his eldeſt ſon *Ruben* of the dignity of Birth-right (for his enormous offence) and in preferring *Ephraim* before *Manaſſes*, the younger ſonne before the Elder, being his Grand-children, againſt the ſet * Purpoſe of *Joſeph* their Father, ſeemes unanſwerable on behalfe of * Parents Power for transferring, or diſtributing their Bleſſings. Of which it may be verified: *Qui prior in Benedictione, eſt potior in Jure.*

Ruben. See Gen. 49. 4. & 1. Chro 5 1.

Ephraim. *Gen. 48, 18.

* *Grandfathers* are uſually called *Fathers* in Scripture; ſpecially in reſpect of ſuch as inherit after them.

Of *Solomon* I have ſpoken before, who was not *Davids* Eldeſt, but *Adonias*, after *Abſalon* was ſlaine: as *David* himſelfe was not the Eldeſt ſonne of *Jeſſe* his Father, but the yongeſt, and yet * choſen by God (who ſees not as Man doth, for with him is no reſpect of Perſons) to governe *Iſrael*, though he was not ſet before his Brothers in the private Inheritance of the Family. And in the Goſpell it is apparent by the Parable of the Workmen, who came at unequall houres into the Vine-yard, and yet had equall Wages, that Firſt and Laſt are to him alike; who though he created Things in number, Weight, and Meaſure, yet hee ſquares not his Favours by priority of Being, * but of well-deſerving.

* See 1. Chro. 28. 4.

*Witneſſe *Iſmael* diſinherited, and *Iſaak* (the younger) preferr'd by *Gods Award*. See Gen. 21. 12. where ver. 10. & 11. it is cleare, that *Abraham* had (*otherwiſe*) divided his inheritance betwixt them.

Auguſtus Cæſar, the moſt Illuſtrious of all the firſt Emperours, ſetled the Imperiall ſucceſſion, not upon his only Grand-child *Agrippa Poſthumus*, the ſonne of his daughter and ſole Heire, the Lady *Julia*, though *Tacitus* ſaith, he was *nullius flagitii compertus* (then what, if he had indeed beene a notorious Unthrift?) but upon *Tiberius*, a ſtranger in Blood, and his ſonne by no other, but by a Civill Title of *Adoption*, becauſe he reputed him farre the fitter to governe.

[*Can the world yeeld a better Precedent?*] N.B.

Tiberius.

Choſroes King of *Perſia*, made *Medarſes* his yonger ſonne, Conſort in his Empire, leaving out his Eldeſt *Sinochius*.

Medarſes

But to omit forraine Examples (for Brevity ſake) where-

with (of all Times and Places) Bookes are full: In our Country we might alleage the Fact of *Brutus*, the Protoparent of our Nation, who divided *Albion* (afterward call'd *Britaine*) to his three ſonnes, leaving only the beſt * Portion to *Locrinus*, anciently called *Loegria*, *Albania* (now *Scotland*) to *Albanact*, and *Cambria*, or *Wales*, to *Camber*.

Brutus.

* England.

Leir, long after, knewe he had ſo much Power in himſelfe as a Father, even againſt the Evidence of his owne Act of Partition, by the Originall Law of Nature, as for the Ingratitude of his owne Children, to conferre the Kingdome wholy upon his younger Child *Cordeilla*, in Prejudice of his Grandſonnes, *Morgan* and *Cunedage*, borne of his Eldeſt daughters.

Cordeilla.

I know ſome will give no credence to *Brutus* Story, which in this caſe they might with the more Reaſon doe, if the ancient Weale, or Britiſh Cuſtome, were not reſponſible in the Practiſe thereof, to that Act of *Brutus*. For, not only King *Roderik* divided his Kingdome of *Wales* to his three ſonnes, (according to that diſtinction of the Country into *North-Wales*, *South-Wales*, and *Powis land*) but Others ſince have done the like among them.

Roderik.

As for *Brutus* Hiſtory, as it hath ſome Enemies, ſo alſo hath it many Friends, and thoſe of Eminent Worth and Eſteeme. *Henry* Archdeacon of *Huntington*, *Matthew* of *Weſtminſter*, and others among the Ancient. Of latter Times, Sr *John Price*, *William Lambert*, *Humfrey Lloyd*, Dr *White* of *Baſingſtoke*, Count *Palatine* in right of the Civill Law Chaire (an Honour due to the juſt Number of yeares by him paſſed) and innumerable others. Above all the reſt, *Edward* the firſt, King of *England*, with all the Earles & Barons of this Realme, by their Authentike Deed or Inſtrument, confirmed in Parliament. But to proceed.

They who knowe the old Faſhions of *Ireland*, either by Tradition, or by printed Statutes of that Nation, can teſtify of their moſt ancient Tenure, or Fundamentall Cuſtome, which there is called *Taniſtry*. By which, the Land and Cheefty of a Name, after the Predeceſſors Death, is not awarded to the Eldeſt ſonne, but to the Worthieſt (if I miſ-remember not) the Judgement whereof is left to the People, and ſuch Tenents

Iriſh Taniſtry

as have Intereſt & Right of Suffrage: (as *Alexander* the Great, though as 'tis apparent in the *Maccabees*, very falſely is ſaid to have left his Empire.) And the Cuſtome of equall ſhares may be in other places alſo, which never borrowed their equall Partitions from *Gavelkinde*: A Cuſtom, I grant, which ſome have lately alter'd in their Private Families by Parliament. 1. Macc. 1. 7.

To omit a Number of unexceptionable Precedents and forraine Examples; If *All* muſt *neceſſarily* have gone to *One*, how came it then to paſſe, that *in this Kingdome* there were *at one time*, ſo many Great and Honourable Families of *one Blood*, diſjoyn'd in their ſeats, and diſtinguiſhed in their Armories by different Arguments? Or, who is ſo meanely ſeene in our Antiquities and Stories, as not to know it was ſo? And that many renowned Houſes (ſo ſpeake as *de magis notis*) *Plantagenets*, *Mortimers*, *Beaufords*, *Beauchamps*, *Dela-Poles*, *Nevils*, *Graies*, and the *like*, have growne and flouriſht out of one common Anceſtor? It can never be refelled. *Sundry great Families of one Blood at a Time.*

Of Diſinheriſons in Worthy Families, *Mr William Camden Clarenceaux* King of Armes (the ſingular Ornament of England) gives us two Eminent Examples. (And who is he, that remembers not one or other, in his owne Knowledge, or Acquaintance?) *Carews.*

Jane, Daughter of *Hugh Courtney*, and Heire to her Mother, wife of *Nicolas* Lord *Carew*, diſinheited her Eldeſt ſoone *Thomas*; *eam minus reverenter matrem haberet*, for his irreverent Demeanour; and parted her Lands (which were goodly) among her three younger ſonnes: of whom are ſprung three ſeverall Worſhipfull Houſes of the *Carewes*; called *Haccombe*, *Anthony*, and *Buty*. So that God by the ſucceſſe crowned the Fact, and conferm'd the Lawfulneſſe of *Partage*.

And this is the firſt of Mr *Camdens* Examples.

The other is this. *Bryan de Lyle*, or *Fitz-Earle*, Lord of *Abergavenny*, having two ſonnes, both Leprous, built for them a *Lazaretto* or Spittall: and gave to *Miles* Earle of *Hereford* farre the greateſt part of his Patrimony from his Children. The One of theſe Examples is in the Diſcription of *Devonſhire*, and this other in *Monmouthſhire*. And this may ſuffice for clearing the former Document (the ſubject of this whole Diſcourſe) by Exemplification. *Brientius de Inſula.*

CHAP.

CHAP. 10.

That the Law of Naturall Equity & Reason confirme just Disinherison: and that the riotous lives of Elder Brothers deserve that vehement Increpation with which the Author closeth up this Treatise.

LET us now look into the Nature of Equity, and examine whether in Naturall Reason (which is the Law of all Lawes) the Temperate ought to be subject to Intemperate: (I mean, within the Verge of private Families.) Fooles and Prantiks, to whom no Law imputes * Sinne, are not punisht for Theft or Murther, or for any other Offense which they doe, being mad, or unreasonable. And though humanely they cannot offend; yet, in THIS SORT according to Equity, they may be punished. The Reason is: All Law being grounded on Naturall Equity (otherwise it is no Law) doth not only punish Offenses committed; but also prevents Offenses which may be done, by rationall or irrationall Creatures. And since Fooles and Madmen cannot offend to be punisht, or by punishment be reform'd; and yet they with whom they live, shall inevitably be offended, if not overthrown by them having * power, (as namely Brothers, Sisters, and their whole Family put in danger of extreame Misery and Ruine) the Law according to all NATURALL EQUITIE takes all Power from them.

I have inserted this clause [*according to Naturall Equity*] for, that it is against Nature, that Men should be subject to Beasts, or insensible Creatures. Whereupon *Aristotle* disputing the Nature of Rule and Subjection, saith: that None are borne * slaves, but such as, Nature hath abridged of the Use of Reason, who being truly slaves, are utterly unfit to govern. Upon which Ground, the same Great Philosophers, prefers that Forme of Politie, where the Wisest and Best are admitted to the Manage of State-Affaires: (as at this day is most conspicuous, in the blessed Raigne * and Regiment of our Most Gracious and Glorious SOVERAIGNE; whom God preserve.)

* *Voluntas crimen non habet, ubi furore peccatur,* Salvian.

* *Nothing more dangerous then armed Madnesse.*

* Servitude proceeds not from the Law of Nature, but from Nature corrupted *See Mr Downings Discourse of the State Ecclesiast. p. 68.*

* Consule *Plutarchus & Vota Illustrissimi Equitis, D. Henrici Wottoni*, Viri omnium literarum, linguarum, ac Virtutum laude florentissimi.

But

But it may be ſaid, What is all this to our Purpoſe? Yes: thus farre it may bee well applied: If Natures Intent to make all Man-kind, Reaſonable, according to their *Species*, being hindred by ſome inevitable Accident, ſhall ſo blemiſh & maime Thoſe, in whom ſuch Defect and Naturall Weakneſſe ſhall be found that They (according to Divine and Humane Law) may and ought to bee deprived of all Right and Claime to any Thing, (more, then to ſuſtaine Nature) and debarred from all Superiority and Seniority, which by Law or Cuſtome might otherwiſe have falne on them; (becauſe, according to Naturall and Divine Equity, MAN ought not to bee govern'd by BEASTS; ſuch as Idiots and Franticks ſeeme to be:)

If This bee ſo, as according to Natures Rule it cannot bee otherwiſe, what puniſhment ſhall wee thinke due to *That Reaſonable Creature*, borne in a Civill Society of Men, to whom Nature hath not beene a Step-dame in beſtowing her Bleſſings; and whoſe Name, and Family hath beene ennobled & enriched by the Vertue and Induſtry of many Worthy Predeceſſors; who ſhall through Diſorder, and in ordinate Deſires, habituated in him by Cuſtome & Evill Converſation, become an *Unreaſonable and unmeaſurable ſinfull and ſhamefull Creature*, a debauched * *Bedlem*, a wild *American*, a wilfull & moſt intolerable *Madman*, a Thing unworthy the Name of *Man*; a *Prodigall* ſhall I ſay, or a PRODIGIE? who contrary to all *Rule*, *Law*, or *Order* of the moſt *Barbarous* Society of Men, takes away (by his outragious Impiety) the *Soule* (as I ſaid before) of all his Anceſtors; who being *dead*, yet long might live in their * *Poſterity*: and conſumes the Womb of his Family (*Viper-like*) wherein he was borne: and without all Remembrance of his obligement to the Dead (whom, as having his *Being* from them, he ought to *honour*) or reſpect to the Living (to whom hee ſhould bee a *Comfort*) deVoures in ſome ſort, them of his owne *Species*, Society, & Blood: All which, the *Canibals* doe not: For though they feed

The Prodigals Character. See more of this Subject, in that Reverend and Illuſtrious Author *Democritus Junior*. Part. 1. §. 2. Memb. 3. ſubſect. 13.

* The Civill Law appoints Curators for Prodigals (as for Madmen) and Guardians likewiſe of their Eſtates: the Want whereof, is the Ruine of many great Houſes in England. See D. Ridley, *ubi ſup. p.* 268. *where hee notes a Defect in our Lawes which have no proviſionall order therein.* * Immortalitatem ſpondet [*Deus Arabæ*] cum genus promittis. Ambroſ. *A riotous heire a Civill Monſter.*

on their *Species*, which are Men like Themſelves; yet they hunt after *Strangers*, and nouriſh themſelves with *Others Fleſh*, obſerving ſtill ſome Law of Society among Themſelves, which our CIVILL MONSTER doth not. For he, contrary to all Courſe of Nature, ſucks oftimes the Blood of his neareſt and deareſt Friends: namely his *Children*, *Brothers*, and *Siſters*: yea, ſome of theſe *furious Fiends* have brought their *all-tender hearted Parents* to the Greateſt of all Woes, *Beggery in their Old Age*. And all this, to maintaine by Force, or Fraud, *a damned Crew* of *Roring Divels* in the ſhapes of Men. Of each of whom, we may ſay, dividually;

Tali Bacchus *erat, tali* Gargantua *vultu*;
Tale triplex * *mentum* Pantagruelis *erat.*

So did old *Bacchus*, or *Gargantua* ſwell;
And ſuch a *Bull-chin*, was *Pantagruell.*

* Of the Family of the Treble-chins.

And of the whole Mad-cap *Fraternity* (for they will needs be * *Sworne Brothers*)

Peſtis, quâ gelidum Boreæ violentius Axem
Nulla vel infecit, nulla vel inficiet:

A greater Plague to this our Northerne Clime
Never yet came; nor can, in After-Time.

* *Fratres in malo*: or *fraterrimi* (as was ſaid of *Friers*)

But to returne, from the purſuit of theſe *Salvages*: Nature hath given, yea ſhee hath ſo ſtrongly *inhabituated* a laudable Deſire in all Creatures to * preſerve their *Species*; that directly or indirectly to attempt the Contrary, were more then Monſtrous Immanity. Families, be they *Princely*, *Noble*, *Gentile*, or *Vulgar*, are in a ſort particular Kinds, or *Species* allow'd of by Natures Law to bee raiſed, and maintain'd, under, or in their cheefe *Genus*, Mankind Vniverſall: which to deſeat or overthrow, by irregular, extravagant, and exorbitant Courſes, let the Philoſopher, either Naturall or Morall; the Lawier either Civill or Canon; the Divine, Schoolman, or Caſuiſt; judge how puniſhable.

* *Salvianus* excellently demonſtrates this in Bees. *De guber. Dei* l. p. 120.

Totus namque mundus, & totum humanum genus, pignus eſt creatoris ſui *Salviau. ubi ſup.*

Morall Law-makers in ancient Times prætermitted to make Lawes againſt Offenders of this nature. Being asked Why? They anſwer'd: That no Man could be ſo impiouſly ingrate, or inhumane. Whereby is evidenced, how *tranſcendently haynous* the Offenſe was adjudged by them, and how ſevere Puniſhment (were they to make Lawes in theſe our corrupt Times)

Times) they would preſcribe for ſuch *Cardinall Criminalls.*

Thus much for the Ventilation of the preſent Point in Queſtion. In the arguing whereof, if what I write in defenſe of Younger Brothers (as here the Caſe is put) I ſeeme to have receav'd *Ex traduce*, rather then *Ex certâ ſcientiâ*, the wiſer ſort will (I hope) not blame mee. For my Intent was onely, (as at firſt I promiſed) to ſet downe a Table-Diſcourſe, and not a Controverſy diſcuſt in Schooles. If I have ſpoken according to Dialecticall Reaſon (as I beleeve) then may I ſafely thinke, that my Diſcourſe is arm'd with ſtrong Authority. For what hath beene ſpoken heretofore truely, which Reaſon hath not dictated to all * Authors Pennes? If therefore I were able to cite a Thouſand Great Authors for what I have ſaid, yet All would amount to no more, but that which Naturall Reaſon hath, or may teach daily. All which, with my Selfe, I intruſt to the gentle and equall Cenſure of my Courteous *Reader.*

* *Salvianus* in this Caſe may ſpeake for All: *Nam licet omnes admodum filii membra parentum eſſe videantur, non putandi ſunt tamen membra eorum eſſe a quibus affectu experiri diſcrepare; quia morum degenerantium pravitate pereunt in talibus beneficia naturæ*: Though all Sonnes be equally Members (or Portions) of their Parents, yet are not They ſo to be reputed, that ſhall *by lewd Courſes* wilfully diſmember themſelves from them: for, degenerate Conditions render ſuch Children unworthy of the Benefits of Nature. *Salvian de gubern. Dei. lib. 3.*

FINIS.

Implumis ales nunquam Cœlum
Omnivago penetret volatu.

LAUS DEO ET JESU MEO.

SALVIANUS SALONIO EPISCOPO.

OMnia admodùm dicta tanti existimantur, quantus est ipse qui dixit. Siquidem tam imbecilla sunt judicia hujus temporis, ac penè tam nulla, ut hi qui legunt, non tam considerent quid legant, quàm cujus legant, nec tam dictionis vim atque virtutem, quàm dictatoris cogitent dignitatem. Idcirco scriptor ille &c.

SSSS